

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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AROMATHERAPY ASSOCIATES, INC.

Case No. 7:22-cv-09184

Plaintiff,

COMPLAINT

-against-

BIRCHBOX, INC. and FEMTEC HEALTH,

Defendants.
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Plaintiff Aromatherapy Associates, Inc. (“Aromatherapy”), by and through its attorneys, LYONS MCGOVERN LLP, and as and for its Complaint against Birchbox, Inc. (“Birchbox”) and FemTec Health (“FemTec”) alleges as follows:

PARTIES

1. Aromatherapy is a corporation which is organized and existing under the laws of the State of Texas, whose principal place of business is in the State of Texas. Aromatherapy is a manufacturer and distributor of certain cosmetics, skin care, hair care, and grooming products.

2. Upon information and belief, defendant Birchbox is a corporation organized and existing under the laws of the State of Delaware whose principal place of business is located at 16 Madison Square West, 4th Floor, New York, New York, 10010. Birchbox is in the business of the promotion and retail sale of consumer products through websites and retail stores.

3. Upon information and belief, defendant FemTec is a corporation organized and existing under the laws of the State of Delaware. At all times relevant to this Complaint, FemTec was transacting business in New York through its acquisition of Birchbox, located at 16 Madison

Square West, New York, New York 10010. Upon information and belief, defendant FemTec is in the women's health and wellness business and acquired Birchbox in or about October 2021.

JURISDICTION and VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(2). Jurisdiction is proper because (1) the amount in controversy exceeds \$75,000.00, exclusive of costs, interest, and attorneys' fees, and (2) Plaintiff and Defendants are citizens of different states.

5. Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b)(2) because defendant Birchbox maintains a place of business in New York City which is where the events giving rise to the claims occurred. Venue is also proper as Aromatherapy and Birchbox consented to having any disputes arising under their Distribution Agreement adjudicated in this Court and governed in accordance with the laws of the State of New York.

NATURE OF THE ACTION

6. This is an action by Aromatherapy to recover the sum of \$424,195.08 due and owing from defendants, together with costs, plus interest and attorneys' fees in connection with Aromatherapy's provision to Birchbox of certain products pursuant to a Distribution Agreement. Said products were provided to Birchbox for the express purpose of being offered by Birchbox to its customers through its subscription service.

7. The Distribution Agreement further provides that the prevailing party shall be entitled to attorneys' fees and related expenses in any suit or proceeding with respect to the subject matter of the Agreement or arising from or related to it.

FACTUAL ALLEGATIONS

8. In or about January 26, 2021, Aromatherapy and Birchbox entered into a Distribution Agreement (the “Agreement”), pursuant to which Birchbox was designated an authorized retailer of Aromatherapy’s products. Under the Agreement, Aromatherapy was to provide Birchbox with certain products as ordered by Birchbox, which were to be offered to Birchbox’s customers through its monthly subscription service. In exchange for these products, Birchbox agreed to make payment to Aromatherapy as more specifically set forth therein.

9. The Agreement was in effect from January 26, 2021 for an initial term of one year, and the Agreement was to automatically renew for successive one-year terms unless notice of non-renewal was served by either party. Neither party served a notice of non-renewal of the Agreement which remained in full force and effect up through and including the time of Birchbox’s breach beginning on or about March 2022.

10. In or about October 2021, while the Agreement was still in full force and effect, FemTec acquired Birchbox. Upon information and belief, this acquisition included the purchase of all of the assets of Birchbox.

11. Pursuant to the Agreement, Birchbox submitted to Aromatherapy periodic Purchase Orders (collectively “Purchase Orders”) to request specific products in specific sizes and/or quantities. In accordance with these Purchase Orders, Aromatherapy provided the specified products to Birchbox. Invoices for the products were issued at the time of shipment, and payment terms were net 30, subject to receipt and inspection of the products by Birchbox. This process was repeated without incident from the effective date of the Agreement through January 2022.

12. On January 24, 2022, Birchbox issued Purchase Order No. 340677 to Aromatherapy for products totaling \$214,500.00 (“Purchase Order No. 1”). The products were ordered for delivery between April 15-29, 2022.

13. In satisfaction of Purchase Order No. 1, Aromatherapy manufactured and shipped the requested products to Birchbox’s receiving facility. On March 29, 2022, Aromatherapy issued to Birchbox Invoice No. 69540 for the products totaling \$214,437.08 (“Invoice No. 1”).

14. The products included in Purchase Order No. 1 and Invoice No. 1 have been delivered to and accepted by Birchbox. With the exception of a trivial quantity of damaged items that were immediately credited, Birchbox has never otherwise expressed any displeasure with, or raised any claims regarding their lack of satisfaction with, or questioned the sufficiency of, the balance of the products in this order. Birchbox has received and accepted this order, but has made no payment despite multiple requests by Aromatherapy.

15. Also on January 24, 2022, Birchbox issued Purchase Order 340678 to Aromatherapy for products totaling \$187,500.00 (Purchase Order No. 2). The products were ordered for delivery to be made between July 18 – August 1, 2022.

16. In May 2022, Birchbox made payments to Aromatherapy in the sum of \$1,251.50 and \$983.00 for balances due on other invoices numbered 69736, 68584, 68604 and 69110 (collectively “Other Invoices”). However, no payment was made on the outstanding full balance of \$214,437.08 on Invoice No. 1 despite due demand therefor.

17. In the intervening time since Purchase Orders Nos. 1 and 2 were issued in January 2022, Birchbox issued Purchase Orders 341158 for \$1,248.00 (“Purchase Order No. 3”) and 341247 for \$360.00 (“Purchase Order No.4”) in May 2022. The products ordered were shipped and corresponding Invoices 70495 (“Invoice No. 3”) and 70382 (“Invoice No. 4”) were issued.

Upon information and belief, these shipments were received and accepted by Birchbox. Birchbox has never expressed any displeasure with, or raised any claims regarding their lack of satisfaction with, or questioned the sufficiency of, the products in these orders. Despite demand therefor, Birchbox has not made payment for the amounts owed on Invoices Nos. 3 and 4.

18. Thereafter, on June 7, 2022 Birchbox issued Purchase Order No. 341311, in the amount of \$10,650.00 (“Purchase Order No. 5”). Aromatherapy shipped these products and issued Invoice No.70421 on June 8, 2022 in the amount of \$10,650.00 (“Invoice No. 5”). Upon information and belief, this shipment was received and accepted by Birchbox. At no time during the prescribed shipment review period did Birchbox raise any issues as to the quality or sufficiency or condition of the products it received. Additionally, no payment was ever made in relation to that shipment. Nevertheless, in or around September 2022, Birchbox requested replacement of a trivial quantity of the product which it alleged had been damaged during shipment. Birchbox did not provide any evidence of the alleged damage to any of the products, and has never otherwise expressed displeasure with, or raised claims regarding their lack of satisfaction with, or questioned the sufficiency of, the balance of the products in this order. Despite demand therefor, Birchbox has still not made payment for any portion of the amount owed on Invoice No.5.

19. Despite having requested but not receiving payment for Invoices Nos.1, 3, 4, and 5, on June 22, 2022 Aromatherapy in good faith prepared for shipping the products contained in Purchase Order No. 2. For this order, Aromatherapy issued Invoice No. 70566, dated June 22, 2022, in the amount of \$187,500.00 (“Invoice No. 2”).

20. In good faith, Aromatherapy corresponded with Birchbox repeatedly by email from April 4, 2022 through July, 2022 to request payment of Invoice No. 1 which remained unpaid for many months.

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